

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6194

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WATERMAN STEAMSHIP CORPORATION,

Plaintiff-Appellant,

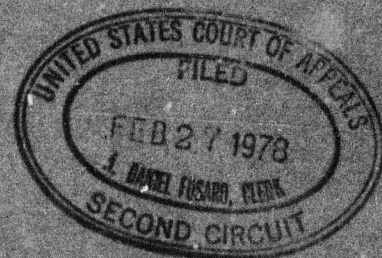
v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



BARBARA ALLEN BABCOCK,
Assistant Attorney General,

ROBERT B. FISKE, JR.,
United States Attorney,

MORTON HOLLANDER,
MICHAEL KIMMEL,
Attorneys,
Civil Division, Appellate Section,
Department of Justice,
Washington, D. C. 20530.



I N D E X

	<u>Page</u>
Question presented -----	1
Counterstatement of the case -----	1
1. The Shipping Agreement and Rate Guide -	2
2. Ocean transportation rates -----	3
3. Minimum ocean transportation charges for exclusive military use of vessels -----	3
4. Offloading charges -----	7
5. Voyages made and cargo offloaded in this case -----	8
6. District court proceedings -----	14
Argument	
THE TERMS OF THE SHIPPING AGREEMENT DO NOT GRANT THE CARRIER ANY "MINIMUM" REVENUE FOR OFFLOADING CARGO; OFFLOAD- ING CHARGES ARE BASED EXCLUSIVELY ON ACTUAL TONNAGE OFFLOADED TIMES OFFLOAD- ING RATE -----	15
A. The Rationale And Justification For Minimum Transportation Charges Has No Application To Offloading Charges --	16
B. The Language Of The Agreement Requires Offloading Charges To Be Based On Actual Tonnage Offloaded; Minimum Charges Apply Only To Transportation Services -----	17
C. The Suez Canal Surcharge Provision Does Not Assist Waterman's Position, But, Instead, Cuts The Other Way, And Reveals The Unreasonableness Of Waterman's Position -----	23
D. No Applicable Canon Of Construction Supports Waterman's Position -----	27
Conclusion -----	32
Certificate of service -----	32
Addendum -----	1b

<u>Cases:</u>	<u>Page</u>
Astro-Space Laboratories, Inc. v. United States, 470 F.2d 1003 (Ct. Cl. 1972) -----	28
Armco-Steel Corp. v. Stans, 431 F.2d 779 (C.A. 2, 1970) -----	5
Barnsdall Oil Co. v. Leahy, 195 Fed. 731 (C.A. 8, 1912) -----	31
Dana Corp. v. United States, 470 F.2d 1032 (Ct. Cl. 1972) -----	29
Deloro Smelting and Refining Co. v. United States, 317 F.2d 382 (Ct. Cl. 1963) -----	29
Four Star Comics Corp. v. Kable News Co., 289 F.2d 632 (C.A. 2, 1961) -----	28
General Warehouse Two, Inc. v. United States, 389 F.2d 1016 (Ct. Cl. 1967) -----	30
LTV Aerospace Corp. v. United States, 425 F.2d 1237 (Ct. Cl. 1970) -----	26
Lucas Coal Co. v. Interior Board, 522 F.2d 577 (C.A. 3, 1975) -----	28
Rawleigh, Moses & Co., Inc. v. United States, 475 F.2d 606 (Ct. Cl. 1973) -----	29
Rehart v. Clark, 448 F.2d 170 (C.A. 9, 1971) ---	28
States Marine International, Inc. v. Peterson, 518 F.2d 1070 (C.A.D.C. 1975), certiorari denied, 424 U.S. 912 (1976) -----	28
Sternberger v. United States, 401 F.2d 1012 (Ct. Cl. 1968) -----	29
Udall v. Tallman, 380 U.S. 1 (1965) -----	28
United States v. Seckinger, 397 U.S. 203 (1970)-	29,30,31
Utah Constr. Co. v. United States, 384 U.S. 394 (1966) -----	16,28
Wells v. Carlisle Tire Corp., 98 Conn. 657, 120 Atl. 153 (1923) -----	31
Zidell Explorations, Inc. v. United States, 427 F.2d 735 (Ct. Cl. 1970) -----	16

Statutes and regulations:

Page

Suits in Admiralty Act, 46 U.S.C. 741 -----	1
10 U.S.C. 2631 -----	29
32 C.F.R. 7-103.12(a) -----	16,29

Miscellaneous:

3 Corbin, Contracts (1960) -----	28,31
----------------------------------	-------



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ON APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR THE APPELLEE

QUESTION PRESENTED

Whether Waterman's ocean carriage contract with the government required the government to pay offloading charges for cargo not carried or offloaded.

COUNTERSTATEMENT OF THE CASE

Waterman Steamship Corporation, an ocean carrier, brought this action against the United States under the Suits in Admiralty Act seeking a judgment in the amount of \$113,780.41, representing what it claimed as additional

reimbursement due it under its ocean carriage contract with the government. The district court held that Waterman was not entitled to this additional sum under the terms of the contract, and dismissed the complaint. Waterman filed this appeal.

1. The Shipping Agreement and Rate Guide. The ocean carriage contract involved in this case was entered into in June 1974 between Waterman Steamship Corporation and the Military Sealift Command or MSC (Department of the Navy), an agency of the United States (Govt. Exh, 1). The detailed provisions of this contract were set forth in MSC's Shipping Agreement and Rate Guide ("Agreement"), which the contract incorporated by reference. This Agreement, which is a standard document governing most other carriage contracts with MSC,^{1/} establishes "the terms under which the Carrier offers to accomplish ocean transportation of such lawful cargo * * * as may be tendered from time to time by the Government for carriage under this Agreement" (Agreement, p. 11).

Under the Agreement the carrier agrees to transport cargo from time to time on ocean routes specified in the Agreement, at rates specified in the Agreement, when requested to do so by MSC in specific written "shipping

^{1/} The Shipping Agreement and Rate Guide is also applicable to ocean carriage contracts between MSC and American Export Lines, Inc.; American President Lines, Ltd.; Central Gulf Steamship Corp.; Lykes Bros. Steamship Co., Inc.; Matson Navigation Co.; Pacific Far East Line, Inc.; Prudential-Grace Lines, Inc.; and States Steamship Co. (Agreement, p. 4).

orders" (Agreement, p. 11). The ocean routes specified in the Agreement are world-wide, e.g. U.S. West Coast/Far East Area, U.S. East Coast/United Kingdom & Erie, etc. (Agreement, p. 4). In this particular case the route involved was U.S. Gulf Coast/South Asia & Middle East (Route Index No. 13) (Agreement, pp. 4, 77; App. 19a).

2. Ocean transportation rates. The basic ocean transportation rates are specified in Section II of the Agreement (pp. 53-113), in tables setting forth types or categories of cargo (e.g. regular, light vehicles, heavy vehicles, reefer, hazardous, etc.); carrier; routes; etc.^{2/} Ocean transportation rates for particular carriers, routes, and categories of cargo, are stated in terms of a set dollar figure for each "measurement ton" of manifested cargo carried (Agreement, p. 53; App. 15a). A "measurement ton" is 40 cubic feet (ibid.). Thus, in the case of the cargo transported by Waterman in this case (mostly heavy vehicles from the Gulf Coast to the Middle East), the basic ocean transportation rate was \$85.14 per measurement ton (Agreement, p. 77; App. 19a).^{3/}

3. Minimum ocean transportation charges for exclusive military use of vessels. Normally, commercial

2/ Regular cargo is referred to as "Cargo-NOS," i.e. Cargo "Not Otherwise Specified" (Agreement, pp. 3, 64, 77 etc.; App. 19a).

3/ The basic ocean transportation rate for transportation of light vehicles on this route by Waterman was \$69.74 per measurement ton (Agreement, p. 77; App. 19a).

ocean carriage contracts do not entail use by one shipper of an entire vessel, at least in the case of carriage of "breakbulk" cargo.^{4/} In other words, one vessel will usually carry the breakbulk cargo of many commercial shippers. The typical vessel carrying commercial cargo on a particular route will attempt to carry as much cargo as it has carrying capacity, from all interested shippers, and thus endeavor to realize maximum freight revenues.

The situation is sometimes different in the case of military cargo shipped by the United States Government. Because of military exigencies, isolated military destinations, or other reasons, the government may wish to reserve exclusive use of a particular vessel on which it ships military cargo, even though in particular cases the military cargo may not fill the entire vessel. The government, through MSC, has expressly reserved such a right of "exclusive use" in its standard Shipping Agreement and Rate Guide, in cases where service is provided with a "barge-ship" system (Agreement, p. 39).^{5/}

Because the basic ocean transportation rates specified in the Shipping Agreement and Rate Guide are based on a fixed dollar amount for each measurement ton actually

^{4/} Breakbulk cargo is made up of ordinary pieces or crates of cargo carried either in conventional breakbulk freighters or in barges on LASH vessels (see *infra*, p. 5 n.5), as distinguished from containerized cargo carried on container ships, bulk dry cargo carried on bulk carriers, and liquid cargo carried in tankers.

^{5/} This provision states: "The Contracting Officer may require exclusive use of the barge for military cargo." See also Exh. C2, p. 39.

shipped on the route, the rates would be inequitable to the carrier if the actual utilization of a vessel subjected to exclusive use were substantially below the average utilization of the vessel. Therefore, a special "minimum" ocean transportation charge is provided by the Agreement, where the exclusive use option (for barge-ship systems) is exercised by MSC. This "minimum" is 75 percent of the inside cubic capacity of each barge or lighter subjected to exclusive use by MSC. The relevant provision of the Agreement states (p. 53, App. 16a):

E. BARGE EXCLUSIVE USE PAYMENT: Cargo shipped in a barge required for exclusive use by the Contracting Officer for military cargo shall be freighted at the applicable cargo category rate subject to a minimum charge per barge computed by applying the Cargo NOS rate to seventy five percent (75%) of the inside cubic capacity of the barge. 6/

5/ (continued)

"Barge-ship" systems or LASH ("lighter-aboard-ship") systems involve stowage of breakbulk cargo in specially-constructed barges which in turn are loaded into special ocean-going ships. There are various practical advantages of this system over use of conventional breakbulk freighters, primarily involving inland waterway connections, avoidance of delay in port, and ease of loading. See Armco-Steel Corp. v. Stans, 431 F.2d 779, 782 (C.A. 2, 1970).

6/ The term "NOS" means "Not Otherwise Specified" (Agreement, p. 3). Thus, the term "Cargo NOS rate" means the rate for regular cargo (rather than rate for light vehicles, heavy vehicles, etc.) will be used for purposes of computing the minimum. See supra, p. 3 n. 2. In this case the regular cargo rate ("Cargo NOS rate") was the same as the rate for heavy vehicles (\$85.14) (Agreement, p. 77; App. 19a).

The minimum transportation charge for exclusive use of barges was modified in January 1975 to provide (Exh. C2, p. 53, App. 20a):

(continued on next page)

This means that barges "exclusively" loaded with military vehicles (heavy vehicles) would be subject to an ocean transportation charge, in the case of shipment by Waterman from the Gulf Coast to the Middle East, amounting either to \$85.14 (heavy vehicle rate) times the total number of measurement tons actually shipped in the barge, or to \$85.14 (regular cargo rate) times 300 measurement tons (75 percent of the inside cubic capacity of the barge), whichever charge is higher.^{7/} Waterman was thus guaranteed revenue amounting to what it would earn if 75 percent of inside capacity of each barge were filled whenever the "exclusive use" option was utilized by MSC (and a higher amount

6/ (continued)

E. MINIMUM PER BARGE: Vehicles shipped in a barge shall be freighted at the applicable rate subject to a minimum charge per barge computed by applying the lowest of the three commodity rates NOS, light vehicles, heavy vehicles to 300 MT [measurement tons] for LASH barges and 600 MT for SEABEE barges. This minimum is applicable only when the barge is loaded exclusively with vehicles booked under the terms of this Agreement.

Waterman states that this amendment produced no significant difference in this case, because 300 measurement tons represents 75 percent of the inside cubic capacity of a LASH barge (App. 12a).

7/ As of January 1, 1975 the minimum would be \$69.74 times 300 for each barge, \$69.74 being the "lowest of the three commodity rates NOS, light vehicles, heavy vehicles" (Exh. C2, p. 53; App. 20a).

of revenue if more than 75 percent of inside cubic capacity is actually utilized). This was presumably considered fair by the parties, since a minimum of 75 percent space utilization is economically substantial for cargo vessels, and ocean transportation costs (fuel, wages of crew, maintenance, insurance, amortization, etc.) remain about the same regardless of amount of cargo carried.

The transportation rates and charges specified in the Shipping Agreement and Rate Guide, and detailed above, are designed to compensate the carrier for the general costs of ocean transportation, and, in addition, to provide a profit to the carrier for that service.

4. Offloading charges. The ocean transportation rates specified in the Shipping Agreement and Rate Guide are "applicable on an FIO basis," meaning that they do not include any loading or offloading charges (Agreement, pp. 53, 60; App. 15a, 16a).^{8/} The Agreement makes it clear that, unless otherwise specified, the "Government shall perform or arrange for the loading and discharging of cargo * * *" (Agreement, p. 13; App. 15a). However, under another provision of the Agreement (paragraph 12A), the government had "the option to require the Carrier to discharge or load cargo at the foreign port" (p. 60, App. 16a). Generally, this option is exercised whenever there is an absence of Department of Defense terminal facilities

^{8/} "FIO" means "Free In and Out" (Agreement, p. 4), i.e. the shipper pays separately for loading and offloading, or arranges and pays for this service by a stevedore.

or arrangements at the specified foreign port, thus necessitating direct arrangements by the carrier for offloading. The charges for this offloading service by the carrier, if MSC exercises the option, are set forth in paragraph 12C of the Agreement, which provides (p. 61, App. 16a-17a):

C. When the Government exercises the option set forth in "A" above, the applicable FIO rates set forth herein shall be increased by the charges set forth in the Table of Charges for Stevedoring and Terminal Services to cover cost of discharging or loading between place of rest on the ship and the end of ship's tackle at the overseas port. 9/

The "Table of Charges for Stevedoring and Terminal Services" contains stated dollar rates per measurement ton for loading and discharging specified categories of cargo by particular carriers at particular foreign port locations (all in the South Asia and Middle East range) (Agreement, p. 63; App. 18a, 21a). The rate agreed upon by Waterman for discharging light vehicles at Middle East ports was \$9.15 per measurement ton, and for heavy vehicles, the rate was \$9.25 per measurement ton (Agreement, p. 63; App. 18a). 10/

5. Voyages made and cargo offloaded in this case.

The controversy in this case is whether Waterman is entitled under the terms of the Agreement to a 75 percent of barge capacity "minimum" offloading charge (just

9/ The carrier is responsible for placing LASH barges at the discharge wharf, whether or not the government exercises the option of having the carrier offload the cargo (Agreement, pp. 30, 38).

10/ These rates were changed to a standard \$10.25 per measurement ton in January 1975 (Fhx. C2, p. 63; App. 21a).

as it is to a 75 percent of barge capacity "minimum" transportation charge) in cases where it ships and offloads exclusive military cargo amounting to less than 75 percent of the inside cubic capacity of a particular barge. In other words, the question is whether Waterman is entitled to charge the government for offloading cargo which in fact is neither shipped nor offloaded.

The specific facts from which this controversy arises may be summarized as follows.

Seven voyages, between October 1974 and June 1975, are involved, all between the Gulf Coast (Mobile and New Orleans) and the Middle East (Aqaba, Damman, Jeddah and Kuwait). Shipping orders were issued for each voyage by MSC's contracting officer to Waterman specifying the vessel name; description, weight and volume of cargo to be shipped (mostly military vehicles); loading port; discharge port; LASH barge assignment of cargo; and other relevant details (Govt. Exh. 2). In each case the contracting officer requested the carrier to discharge the cargo at the specified destination port (App. 39a). The parties agree that, while not expressly stated in the shipping orders, the barges in question were subjected to the government's "exclusive use" option for military cargo (App. 39a). In the case of some of the barges shipped on these seven voyages, cargo shipped was less than 75 percent of barge capacity. The controversy in this case concerns the correct charge for offloading vehicles from these particular barges.

Waterman billed the government immediately upon completion of each voyage for transportation charges, in order to obtain the benefit of a prompt payment provision (Agreement, pp. 6, 12; App. 22a). We assume from this record that it was duly paid the applicable transportation charge, based either on actual measurement tonnage carried multiplied by ocean freight rate, in the case of barges carrying 75 percent or more of capacity; or the "minimum" transportation charge (75 percent of barge capacity multiplied by applicable ocean freight rate), in the case of barges carrying less than 75 percent of capacity. In all cases an additional 25 percent Suez Canal surcharge was also applicable (Agreement, p. 61; App. 17a).^{11/}

Shortly after the completion of each voyage Waterman separately billed the government for offloading services. The first bill at issue here, for offloading 18 vehicles from LASH barges aboard the SS ROBERT E. LEE at Aqaba, was \$10,293.75 (Exh. E1, App. 23a). This amount was based on 900 measurement tons (75 percent of capacity

^{11/} See Govt. Exh. 2. This surcharge was predicated on blockage of the Suez Canal, requiring routing of ships around the Cape of Good Hope. Each of the voyages here in question required routing via the Cape of Good Hope (App. 39a).

of 3 LASH barges) times the offloading rate for light vehicles (\$9.15), plus Suez Canal surcharge. ^{12/} The government later authorized payment of a lesser amount -- \$7,752.66 -- a sum which mathematically would be based on 677.83 measurement tons of cargo actually offloaded (i.e. the 18 vehicles) times \$9.15, plus Suez Canal ^{13/} surcharge.

^{12/} By express provision in the Agreement, the Suez Canal surcharge (25%) applies not only to transportation charges, but also to offloading charges (Agreement, p. 61; App. 17a).

^{13/} The record is unclear whether the 18 vehicles billed for offloading in the first bill were light vehicles or heavy vehicles. If light vehicles, the offloading rate would have been \$9.15 per measurement ton offloaded (Agreement, p. 63; App. 18a), mathematically resulting in an offloading charge of \$6,202.13 for 677.83 measurement tons offloaded (plus \$1,550.53 Suez Canal surcharge, or total of \$7,752.66). If heavy vehicles, the offloading rate would have been \$9.25 per measurement ton offloaded (Agreement, p. 63; App. 18a), resulting mathematically in an offloading charge of \$6,202.13 for 670.50 measurement tons (plus \$1,550.53 Suez Canal surcharge, totalling \$7,752.66). The rate quoted in Waterman's invoice (\$9.15, Exh. E1, App. 23a) is the rate for light vehicles. The government's correction to the bill refers to heavy vehicles (Exh. F1, App. 33a). Either way the alleged overbilling in the case of the first bill (Waterman's claim) is \$2,541.09, meaning that Waterman's bill of \$10,293.75 was reduced to \$7,752.66 (\$6,202.13 basic offloading charge, plus \$1,550.53 Suez Canal surcharge).

Similarly, in the case of the second bill (Exh. E2), the record is unclear whether light vehicles or heavy vehicles (30 in number) were involved.

The remaining bills (E3 through E10) were for offloading services completed after January 1, 1975. These services were subject to a revised \$10.25 rate per measurement ton for offloading, regardless whether the vehicles offloaded were light or heavy (Exh. C2, p. 63; App. 21a).

The same occurred in the case of nine other bills presented by Waterman. Amounts billed were reduced as follows: \$17,156.25 to \$12,921.10 (for offloading 30 vehicles from 5 barges of SS STONEWALL JACKSON at Aqaba, Exh. E2, F1); \$49,968.75 to \$34,628.35 (offloading 91 vehicles from 13 barges of SS ROBERT E. LEE at Damman, Exh. E4, F1); \$46,125.00 to \$31,964.63 (offloading 84 vehicles from 12 barges of SS STONEWALL JACKSON at Jeddah, Exh. E5, F1); \$84,562.50 to \$58,601.81 (offloading 154 vehicles from 22 barges of SS SAM HOUSTON at Jeddah, Exh. E6, F1); \$99,937.50 to \$71,767.94 (offloading 182 vehicles from 26 barges of SS ROBERT E. LEE at Jeddah, Exh. E7, F4); \$26,906.25 to \$23,041.36 (offloading 49 vehicles from 7 barges of SS STONEWALL JACKSON at Kuwait, Exh. E8, F3); \$38,437.50 to \$32,197.81 (offloading 70 vehicles from 10 barges of SS STONEWALL JACKSON at Jeddah, Exh. E9, F2); and from \$3,843.75 to \$2,294.73 (offloading 6 vehicles from 1 barge of SS STONEWALL JACKSON at Jeddah, Exh. E10, F5).^{14/}

In each case Waterman had computed its offloading charge on the basis of 75 percent of the inside cubic capacity of particular barges which were less than 75 percent loaded. Thus, its bill for offloading 78 vehicles from

^{14/} The government paid Waterman's bills for offloading services as presented, in the case of the first six bills in question (Exh. E1 through E6), later realized that it had erroneously overpaid (Exh. F1), and recouped the overpayments from moneys otherwise due Waterman. The last four bills (E7 through E10) were initially paid at the government's corrected amounts (Exh. F2 to F5, App. 34a-37a).

13 barges of the SS ROBERT E. LEE at Aqaba was based on 3900 measurement tons (75 percent of the inside capacity of 13 barges, Exh. E3), rather than the 2964 measurement tons actually offloaded. Similarly, in other cases, it billed the government for 3600 measurement tons (75 percent of 12 barges) in lieu of 2494 measurement tons (84 vehicles offloaded at Jeddah, Exh. E5); 6600 measurement tons (75 percent of 22 barges) in lieu of 4573 measurement tons (154 vehicles offloaded at Jeddah, Exh. E6); 7800 measurement tons (75 percent of 26 barges) in lieu of 5601 measurement tons (182 vehicles offloaded at Jeddah, Exh. E7); 2100 measurement tons (75 percent of 7 barges) in lieu of 1798 measurement tons (49 vehicles offloaded at Kuwait, Exh. E8); 3000 measurement tons (75 percent of 10 barges) in lieu of 2513 measurement tons (70 vehicles offloaded at Jeddah, Exh. E9); and 300 measurement tons (75 percent of 1 barge) in lieu of 179 measurement tons (6 vehicles offloaded at Jeddah, Exh. E10). See App. 25a-32a.^{15/}

^{15/} The record does not state the specific measurement tonnage actually offloaded in the case of the first six bills. Hence we have computed the measurement tonnage actually offloaded by dividing the basic authorized dollar amounts computed by the government for offloading services (Exh. F1, App. 33a) by the applicable rate (\$9.15 or \$10.25). The record does state the specific measurement tonnage actually offloaded in the case of the last four bills corrected by the government (Exh. E7 through E10; Exh. F2 to F5, App. 34a-37a).

A table sitting forth respective computations of offloading charges, for each bill in question, based on both the government's and Waterman's positions, is set forth in the Addendum to this brief.

6. District court proceedings. Waterman commenced this action against the government on November 22, 1976 seeking a judgment in the amount of \$113,780.41, representing the difference between the government's computation of offloading charges and its own method (App. 3a-6a), i.e. the difference between offloading charges based on actual tonnage offloaded and offloading charges based on a 75 percent of barge capacity "minimum." Various exhibits were filed, and the parties moved for summary judgment. In a decision issued on October 5, 1977, the district court denied the plaintiff's motion, granted the government's motion, and entered a judgment dismissing the complaint (App. 39a-45a, 46a). The court pointed out (App. 42a, 43a):

The narrow question * * * presented is whether, according to the terms of the agreement, the offloading or discharge charges are to be considered as freight charges to which a 300 MT minimum applies. The unambiguous language of the agreement indicates that such is not the case.

* * * * *

As defendant has pointed out, there is no cost involved in discharging cargo which is not on board the vessel. To subject this increase to the minimum basis allowed for the computation of freight would be to grant plaintiff a double advantage not contemplated by the clause.

Discontent with the district court's rejection of its claim, Waterman filed this appeal.

ARGUMENT

THE TERMS OF THE SHIPPING AGREEMENT DO NOT GRANT THE CARRIER ANY "MINIMUM" REVENUE FOR OFFLOADING CARGO; OFFLOADING CHARGES ARE BASED EXCLUSIVELY ON ACTUAL TONNAGE OFFLOADED TIMES OFFLOADING RATE.

The Shipping Agreement, at paragraph 12C (App. 16a-17a), makes it clear that offloading charges are not included in basic transportation or freight rates. Instead, offloading charges are additional charges, to be computed by reference to a separate "Table of Charges for Stevedoring and Terminal Services" (Agreement, p. 61; App. 17a). The express purpose of offloading charges is "to cover cost of discharging [cargo] between place of rest on the ship and the end of ship's tackle at the overseas port" (paragraph 12C, App. 17a). Specifically, the carrier in this case was entitled to charge \$9.15 (light vehicle rate) or \$9.25 (heavy vehicle rate) or \$10.25 (since January 1, 1975) for each measurement ton (40 cubic feet) of cargo actually offloaded (Tables, p. 63; App. 18a, 21a). Nothing in paragraph 12C of the Agreement or in the Tables says anything whatsoever about any "minimum" revenue for offloading services. The plain intent of the Agreement is that charges for offloading services are based on actual number of tons of cargo offloaded times applicable offloading rate (\$9.15, \$9.25 or \$10.25).

Waterman's argument that it is entitled to a 75 percent of capacity "minimum" offloading charge -- i.e.

300 measurement tons per barge (regardless of lesser tonnage actually offloaded) times applicable offloading rate -- has no basis in the language of the Agreement, or in common sense. Waterman seeks windfall revenues for services not provided. The claim has neither legal ^{16/} nor equitable justification.

A. The Rationale And Justification
For Minimum Transportation Charges
Has No Application To Offloading
Charges.

The 75 percent of capacity "minimum" is a provision of the Agreement (paragraph 1E, App. 17a-18a, 22a) which relates to freight or transportation charges, not to offloading charges. The minimum freight or transportation charge (based on 75 percent of capacity of each barge) is justified by the fact that ocean transportation costs are substantially the same regardless of amount of cargo carried. If the government reserves exclusive use of a vessel for shipment of cargo amounting to substantially less than the generally utilized capacity of the vessel, the government should, and has agreed to, pay enough to make the voyage economically feasible to the carrier. Accordingly, a minimum charge equivalent to 75 percent space utilization is, in these circumstances, guaranteed to the carrier for such exclusive use, and is, in every practical sense, earned by the carrier.

^{16/} The claim should have been resolved administratively under the standard disputes clause. Agreement, p. 43; 32 C.F.R. 7-103.12(a). See United States v. Utah Constr. Co., 384 U.S. 394, 420 (1966); Zidell Explorations, Inc. v. United States, 427 F.2d 735, 737 (Ct. Cl. 1970). However, the government did not object to a resolution of the merits by the district court.

No such rationale supports any similar "minimum" revenue for offloading services. The carrier's costs for offloading cargo are small if the amount of cargo offloaded is small; these offloading costs rise only if the actual amount of cargo offloaded rises, and in direct proportion to such increased cargo. Unlike transportation costs, the carrier does not incur the same offloading costs for offloading 677 measurement tons of cargo (or 60 measurement tons of cargo) as it does offloading 900 measurement tons of the same type of cargo (to take Waterman's first bill, Exh. E1, as an example).^{17/} Accordingly, there is no justifiable reason for a charge of 900 times \$9.15 for offloading 677 tons of cargo. The correct offloading charge in this particular example is 677 times \$9.15 (plus Suez Canal surcharge). Nor is there any more justification for the Waterman's other enlarged billings for offloading services (some being almost double actual tonnage charges).

B. The Language Of The Agreement Requires
Offloading Charges To Be Based On Actual
Tonnage Offloaded; Minimum Charges
Apply Only To Transportation Services

The technical language of the Agreement requires that offloading services be billed in every case on the basis of actual tonnage offloaded. As previously mentioned,

^{17/} I.e. while it costs Waterman about the same to carry 677 tons as it does to carry 900 tons in the same barge, it costs Waterman substantially less to offload 677 tons than to offload 900 tons.

no "minimum" amounts are mentioned in the provision of the Agreement relating to offloading charges (paragraph 12C, p. 61, App. 16a-17a; Tables, p. 63, App. 18a, 21a). The only place in the Agreement where any "minimum" amount is mentioned is the provision relating to transportation (freight) charges, in circumstances where the government reserves exclusive use of a barge for cargo amounting to less than 75 percent of inside cubic capacity (paragraph 1E, p. 53, App. 16a). This "minimum" is computed "by applying the Cargo NOS rate [regular cargo transportation rate] to seventy-five percent (75%) of the inside cubic capacity of the barge" (ibid.), or, as of January 1, 1975, "by applying the lowest of the three commodity rates NOS, light vehicles, heavy vehicles to 300 MT for LASH barges" (Exh. C2, p. 53, App. 20a). Waterman already received the "minimum" when it was paid the transportation or freight charges for each of the barges in question. At that time it was paid the "minimum" transportation or freight charge, computed by multiplying 75 percent of capacity of each barge involved (300 MT) by the "Cargo NOS rate" (\$84.14), or by "the lowest of the three commodity rates" (\$69.74).^{18/} This was all it was entitled to by way of "minimum" revenue.

Waterman's argument as to "minimum" offloading charges appears to be based on a line of reasoning which proceeds as follows: Paragraph 12C

^{18/} Sse Waterman's brief, p. 5.

of the Agreement, relating to charges for offloading services, states that, when such services are rendered by the carrier, "the applicable FIO rates set forth herein shall be increased by the charges set forth in the Table of Charges for Stevedoring and Terminal Services * * *" (Agreement, p. 61, App. 16a-17a). Focusing on the use of the term "FIO rates * * * shall be increased," Waterman argues that the basic transportation or freight rate (e.g. \$84.14) must be "increased" by the offloading rate (e.g. \$10.25), and that this higher or aggregate rate (e.g. \$94.39) becomes the constructive "Cargo NOS rate" or "lowest of the three commodity rates" mentioned in paragraph 1E of the Agreement as the dollar basis for computing minimum freight revenues.

It will be observed that Waterman's argument is premised initially on the use of the term "FIO rates * * * shall be increased" (in paragraph 12C of the Agreement). If the quoted clause here had stated "FIO charges * * * shall be increased," Waterman's linguistic premise to its argument would completely disappear. Quite clearly, however, the term "FIO rates" in this context means the same as "FIO charges." This is made clear by the general method of computing both freight charges and offloading charges. Under the general terms of the Agreement, cargo will be freighted (i.e. transportation charges computed) on the basis of actual tonnage carried, as

long as relatively full loads are carried. Thus, adding freight "rates" and offloading "rates," and multiplying the sum of the two "rates" by actual tonnage carried and offloaded, produces the same result as separately computing the "charges" for these services and adding the sum of the two "charges." Either method produces an equivalent result,^{19/} and one which is generally contemplated under the terms of the Agreement as the carrier's total payment for transportation and offloading services, if the government requests the carrier to offload the cargo. This may explain the somewhat general language used in paragraph 12C for computing offloading charges (increasing transportation rates by offloading charges). The main point made by paragraph 12C is simply to make it clear that these "charges" or "rates" (for freight and offloading) are indeed separate, and that, if the carrier is requested to offload the cargo, offloading charges are added as extra charges.

However, the wording of paragraph 12C of the Agreement is not the critical wording in the Agreement insofar as "minimum" charges are concerned, for paragraph 12C says nothing about any "minimum" charge. It is solely paragraph 1E which mentions "minimum" charges, and it is that paragraph on which Waterman must rely for its argument that offloading charges are subject to any "minimum."

^{19/} See infra, p. 25 n.23.

The major defect in Waterman's argument, in light of the actual wording of paragraph 1E, is its assumption that the minimum charges specified in paragraph 1E are computed on the basis of "aggregate" freight and off-loading rates (e.g. \$84.14 plus \$9.15, or \$69.74 plus \$10.25, etc.) rather than on the basis of the actually specified "Cargo NOS rate" or "lowest of the three commodity rates" (\$84.14 or \$69.74).^{20/} On this critical matter (involving the only reference in the Agreement to a "minimum" charge) the language of paragraph 1E is plain. The minimum is computed by applying "the Cargo NOS rate" (\$84.14) (Agreement, p. 77, App. 19a), or "the lowest of the three commodity rates NOS, light vehicles, heavy vehicles" (\$69.74) (Agreement, p. 77, App. 19a) to 300 measurement tons (75 percent) per barge. By no stretch of the imagination may the terms "Cargo NOS rate," "light vehicle" rate, or "heavy vehicle" rate, as used in paragraph 1E of the Agreement, and as specified in the applicable freight rate table in this case (Agreement, p. 77; App. 19a) be converted into some higher rate,

^{20/} Paragraph 1E states (App. 16a):

BARGE EXCLUSIVE USE PAYMENT: Cargo shipped in a barge required for exclusive use by the Contracting Officer for military cargo shall be freighted at the applicable cargo category rate subject to a minimum charge per barge computed by applying the Cargo NOS rate to seventy five percent (75%) of the inside cubic capacity of the barge.

The January 1, 1975 version states in pertinent part (App. 20a):

Vehicles shipped in a barge shall be freighted at the applicable rate subject to a minimum charge per barge computed by applying the lowest of the three commodity rates NOS, light vehicles, heavy vehicles to 300 MT for LASH barges * * *.

representing an addition of the quoted rates to some other rate. Nothing in paragraph 1E says that these specified freight rates are to be increased by offloading rates, for purposes of computing a minimum charge. Nor does anything in paragraph 12C say that the basic freight rates referred to in paragraph 1E are to be "increased" by the offloading rates in the Table for purposes of computing any minimum. Nor does any reason or common sense support any such tortuous construction of the plain terms of the Agreement. Manifestly, the minimum charge specified in paragraph 1E applies to the transportation charges specified, not to offloading charges in addition.

There is no relation whatsoever in the Agreement, either express or inherent, between the minimum charges specified in paragraph 1E, and offloading charges specified in paragraph 12C. In other words, aside from the express intent of paragraph 1E to compute minimum charges solely on the basis of transportation rates, the underlying reality, as we have point out above, is that offloading costs have no relation to transportation costs or to exclusive use of barges, i.e. to the minimum charge formula for transportation. Thus, the provision governing offloading charges (in paragraph 12C) was written without any specific regard to minimum transportation charges (specified in paragraph 1E), and, similarly, the

provision governing minimum transportation charges (in paragraph 1E) was written without any specific regard to offloading charges in paragraph 12C. Waterman's attempt to tie the two provisions (paragraphs 1E and 12C) together, so as to produce a "minimum" offloading charge, has no basis to support it, either from the practical standpoint of what the parties' real expectations and needs were, or from the standpoint of the technical language of the Agreement.

- C. The Suez Canal Surcharge Provision Does Not Assist Waterman's Position, But, Instead, Cuts The Other Way, And Reveals The Unreasonableness Of Waterman's Position.
-

Waterman attempts to gain support for its position by placing much emphasis on the Suez Canal surcharge provision (Br. 7-8). However, that provision does not assist Waterman, for it says nothing about "minimum" charges for offloading services. The paragraph containing the Suez Canal surcharge (paragraph 13, App. 17a), while adding a surcharge (in this case, 25 percent)^{21/} to both transportation charges and offloading charges, does this by express provision. The paragraph states: "In accordance with commercial practice, such surcharge shall be applied on the basic rate and to the charges for stevedoring and terminal services as set forth in the STATEMENT OF RATES when stevedoring is performed by or for the account of the Carrier." (Emphasis added).

^{21/} See Govt. Exh. 2 (shipping orders).

Thus, the presence of this provision, if anything, cuts in favor of the government's position in this case, for it shows that, where different or higher charges from those specified in the rate tables are intended by the Agreement, such intention is manifested in clear and express language.

Waterman's argument relating to the Suez Canal provision seems to place a premium on the concept of windfall rates, for Waterman admits (as we do) that blockage of the Suez Canal does not itself increase off-loading costs (Br. 7). However, there is a conceivable rationale, other than windfall, for the Agreement's express application of the Suez Canal surcharge to off-loading rates. Computation of billing is admittedly simpler if surcharges are applied across-the-board rather than to components of cost.^{22/} The amount of the surcharge (25 percent here), while perhaps high in relation to off-loading charges alone, is not high in relation to total transportation and offloading charges. Thus, to take an example involving shipment of 1,000 measurement tons of heavy vehicles from the Gulf Coast to the Persian Gulf via the Cape of Good Hope by Waterman (where no minimum transportation charge applies) the total charge for transportation and offloading, including Suez Canal surcharge, would be \$117,987.50. Of this total, \$2,562.50 would represent Suez Canal surcharge attributable to

^{22/} In commercial maritime practice surcharges are applied across-the-board because commercial rates are not broken down between transportation and loading/offloading services (these services being the normal responsibility of the carrier to provide or arrange).

offloading, i.e. 25 percent of offloading charge and less than 2.5 percent of the total charge.^{23/}

More to the point, the surcharge is fixed and does not produce wildly varying returns depending on extraneous factors. It is as if the rates themselves were increased a flat 25 percent whenever the surcharge applies. While the surcharge might be looked upon as windfall in regard to offloading charges, it is a modest, limited and fixed windfall, justified not only by the express language of the Agreement, but also, apparently, by the general commercial practice of applying one surcharge to combined rates.

^{23/} The supporting arithmetic here is as follows:

Cargo carried	1,000 MT	
Times rate	\$ 84.14	
Equals	\$ 84,140.00	
Plus Suez Canal		
surcharge (25%)	\$ 21,035.00	
Total freight	\$105,175.00	\$105,175.00
Cargo offloaded	1,000 MT	
Times rate	\$ 10.25	
Equals	\$ 10,250.00	
Plus Suez Canal		
surcharge (25%)	\$ 2,562.50	
Total offloading	\$ 12,812.50	\$ 12,812.50
Aggregate charge		\$117,987.50

As pointed out (*supra*, pp. 19-20) the result here is the same if the computation for transportation and offloading is combined:

Cargo carried and offloaded	1000 MT
Times aggregate rate	\$ 94.39 (\$84.14 plus \$10.25)
Equals	\$ 94,390.00
Plus Suez Canal	
surcharge (25%)	\$ 23,597.50
Aggregate charge	\$117,987.50

The result which Waterman seeks in this case is excessive or unlimited, and wildly varying windfall, which does not have any support in the language of the Agreement, or in commercial practice. Waterman seeks to charge, for offloading any tonnage less than 300 per barge, the same as it could charge if it had in fact offloaded 300 tons per barge. If only 30 tons are offloaded from 1 exclusively-used barge, the basic windfall accruing to Waterman under its theory would amount to 1000 percent of the basic charge for actual tonnage offloaded! And to this inflated amount Waterman would be entitled, in turn, to add 25 percent of the inflated amount, as Suez Canal surcharge. Thus, under its theory, Waterman would be entitled, in toto, to 1250 percent of the basic offloading charge, if it offloads 30 tons from a barge!^{24/} The Suez Canal surcharge itself increases from 25 percent to 250 percent in this example. Thus, Waterman is indeed relying on the Suez Canal surcharge -- to create a compounded or multiplied windfall.

^{24/}		
Correct offloading tonnage	30 MT	
Times rate	\$ 10.25	
Equals	\$307.50	
Plus Suez Canal surcharge (25%)	\$ 76.87	(25 percent of \$307.50)
Amounts to:	\$384.37	
Waterman's offloading tonnage	300 MT (1000 percent of 30 MT)	
Times rate	\$ 10.25	
Equals	\$3,075.00	(1000 percent of \$307.50)
Plus Suez Canal surcharge (25%)	\$ 768.75	(250 percent of \$307.50)
Amounts to:	\$3,843.75	(1250 percent of \$307.50)

While the bills submitted by Waterman do not involve windfalls as excessive as the example set forth above, nevertheless, the theory Waterman urges would permit and sanction such a result -- i.e. a geometric increase in windfalls the less cargo it offloads. Moreover, the amounts Waterman seeks in this case are quite excessive in themselves, and are far greater than the 25 percent Suez Canal surcharge. It seeks, by virtue of its theory, and the Suez Canal surcharge, revenues amounting to the following percentages of basic offloading charges for actual tonnage offloaded: 165 percent (Exh. E1, E2), 164 percent (Exh. E3), 180 percent (Exh. E4, E5, E6), 174 percent (Exh. E7), 145 percent (Exh. E8), 149 percent (Exh. E9), and 209 percent (Exh. E10). These amounts are far in excess of the 125 percent returns permitted by the Suez Canal surcharge. The net windfalls to Waterman, over and above actual-tonnage offloading charges plus surcharge (40 percent, 39 percent, 55 percent, 49 percent, 20 percent, 24 percent and 84 percent) are simply unwarranted. Such windfalls are not supported by any legal, equitable or practical justification, and certainly not by the language or purpose of the Suez Canal surcharge.

D. No Applicable Canon Of Construction
Supports Waterman's Position.

Waterman argues that the Agreement is "ambiguous," and that any ambiguities should be resolved in its favor. We do not view the Agreement as ambiguous. As demonstrated above, the plain terms of the Agreement authorize "minimum" charges only for basic freight or transportation services,

not for offloading services. The offloading charges are computed exclusively on the basis of actual tonnage off-loaded. Since the terms of the contract plainly and fully support this scheme, "there is no occasion" to invoke the "construction-against-drafter" principle. Four Star Comics Corp. v. Kable News Co., 289 F.2d 632, 636 (C.A. 2, 1961).

Even assuming, arguendo, that this Agreement is something less than crystal clear, it does not follow that Waterman's "construction" of the Agreement should be willy-nilly adopted. The maxim of interpreting contracts against the drafter applies only as between two otherwise equally reasonable interpretations. 3 Corbin, Contracts § 559, p. 262 (1960).^{25/} The doctrine has no application where the

^{25/} We have some doubt that the principle of interpreting "adhesion" contracts against the drafter has application to quasi-regulatory government contracts such as the MSC Shipping Agreement and Rate Guide. This standard "Agreement," governing many carriers in a highly regulated industry, is, in many respects, the functional equivalent of a government regulation, as to the carriers subject to it. Cf. Utah Constr. Co. v. United States, 384 U.S. 394, 406-07 (administrative construction of standard contract disputes clause); States Marine International, Inc. v. Peterson, 518 F.2d 1070, 1079 (C.A.D.C. 1975), certiorari denied, 424 U.S. 912 (1976) (contracts for payment of maritime operating subsidies); Rehart v. Clark, 448 F.2d 170 (C.A. 9, 1971) (military enlistment contracts). The canon of construction applicable to government regulations is that the agency's construction, if "reasonable," is entitled to deference by the courts. Udall v. Tallman, 380 U.S. 1, 16 (1965); Lucas Coal Co. v. Interior Board, 522 F.2d 577, 584 (C.A. 3, 1975). There is no reason for a different rule in the case of standard government contracts unless the contractor's interpretation is just as "reasonable" as the government's interpretation, and was "actually relied on" by the contractor as a significant inducement to enter into and perform the contract. Astro-Space Labs v. United States, 470 F.2d 1003, 1010-11 (Ct. Cl. 1972); LTV Aerospace Corp. v. United States, 425 F.2d 1237, 1241 (Ct. Cl. 1970).

In this case each shipping order issued to Waterman by MSC (before each voyage) plainly stated: "Payment for discharge of cargo to be IAW [in accordance with] Table

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interpretation offered by the other party in not "reasonable and practical." United States v. Seckinger, 397 U.S. 203, 210 (1970). See, e.g., Sternberger v. United States, 401 F.2d 1012, 1021 (Ct. Cl. 1968). As we have shown above, Waterman's position in this case is neither "reasonable" nor "practical,"^{26/} let alone an equally reasonable interpretation.

^{25/} (continued) Of Charges for Stevedore and Terminal Services" (Govt. Exh. 2). Waterman made no further inquiry or objection before making the voyages. In its brief, it suggests that "perhaps" it would not have agreed to the contract if it had known that windfalls were not available for offloading services (Br. 10). This lukewarm after-the-fact suggestion is not convincing or reasonable. Waterman does not claim that it relied on windfalls to carry this military preference cargo (10 U.S.C. 2631). If it wishes now to plead as an issue of fact what its understanding was when the contract was entered into, it should have proceeded administratively under the disputes clause of the contract. Agreement, p. 43; 32 C.F.R. 7-103.12(a).

^{26/} Waterman argues that its position is "reasonable" because some of its invoices were accepted at face value and initially paid by a disbursing officer. As noted by the court below (App. 31a), this argument was answered in Deloro Smelting and Refining Co. v. United States, 317 F.2d 382, 385 (Ct. Cl. 1963), and Dana Corp. v. United States, 470 F.2d 1032, 1044 (Ct. Cl. 1972). In Dana the court held:

In the instant case, the PDC [Postal Data Center] was a large volume disbursing office whose function was not related to contract administration, and the fact that it was billed and paid the additional amount claimed by plaintiff is not considered significant.

The disbursing officer's payment in this case resulted either from inadvertence, error, or mistaken acceptance of the tonnages in plaintiff's bills as actual rather than fictional. The possibility of erroneous overpayments (and offset) was expressly contemplated and provided for in the Agreement (Art. I:4(c), p. 12). No interpretation of the contract adopting Waterman's position was ever issued by a contracting officer or contract appeals board, or by any other government employee. The case here is quite unlike Rawleigh, Moses & Co., Inc. v. United States, 475 F.2d 606, 611 (Ct. Cl. 1973) where the agency's Contract Appeals Board had, in written

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In United States v. Seckinger, 397 U.S. 203, 210-11 (1970), the contractual language at issue stated that the contractor "shall be responsible for all damages to persons or property that occurs as a result of his fault or negligence * * *." The government brought an indemnity suit against the contractor, arguing that, under this provision, the contractor was responsible not only for its own negligence, but also for the government's negligence (where joint negligence had produced damage). Alternatively the government argued that the clause required each party to be responsible at least to the extent of its own negligence. The Court accepted the government's alternative argument as a concession that the provision was indeed ambiguous, and adopted the alternative construction as the most reasonable one. Although the Court mentioned the "construction-against-drafter" principle, its actual decision "[m]ore specifically" rested on the general rule against allowing an indemnitee to recover for its own negligence "unless the court is firmly convinced that such an interpretation reflects the intention of the parties." 397 U.S. at 211.

We think that this latter principle announced in Seckinger is fully applicable to any interpretation of

26/ (continued) opinions, previously sustained the contractor's interpretation (that its discounts were alternative not cumulative); or General Warehouse Two, Inc. v. United States, 339 F.2d 1016, 1020 (Ct. Cl. 1967), where the government had "in Amendment No. 2 to the lease agreement, agreed to compensate plaintiff for all areas of increased space * * *."

a contract which would, as here, result in a windfall (to either party). In other words, a contract should not be construed to permit a contractor to recover windfall payments "unless the court is firmly convinced that such an interpretation reflects the intention of the parties." We think that this particular aspect of Seckinger is the more pertinent one in this case, reflecting the fundamental principle that the parties are presumed to have contracted on a fair and reasonable basis, and, hence, that an equitable and reasonable interpretation is to be preferred to an inequitable and unreasonable interpretation. 3 Corbin, Contracts § 552, p. 210 (1960); Barnsdall Oil Co. v. Leahy, 195 Fed. 731, 733-34 (C.A. 8, 1912); Wells v. Carlisle Tire Corp., 98 Conn. 657, 120 Atl. 153 (1923).

The government's interpretation of the Agreement in this case is reasonable, practical, equitable, and, indeed, required by the plain terms of the Agreement. Waterman's interpretation is unreasonable, impractical, inequitable, and contrary to the plain terms of the Agreement. Hence whatever canon of construction is applied, if any, the government's interpretation of the Agreement in this case should be accepted, and Waterman's should be rejected.

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

ROBERT B. FISKE, JR.,
United States Attorney,

MORTON HOLLANDER,
MICHAEL KIMMEL,
Attorneys,
Civil Division, Appellate Section,
Department of Justice,
Washington, D. C. 20530.

JANUARY 1978.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1978, I served the foregoing brief by causing copies to be mailed to:

Michael Marks Cohen, Esquire
Burlington, Underwood & Lord
1 Battery Park Plaza
New York, New York 10004

Michael Kimmel
MICHAEL KIMMEL,
Attorney.

A D D E N D U M

OFFLOADING CHARGES

Voyage	First	Second	Third		Fourth
Ship	LEE	JACKSON	LEE		JACKSON
Shipping order number	115-9	151-10	217-16		247-19
Loading port/Discharge port	Mobile/Aqaba	Mobile/Aqaba	Mobile/Aqaba	Mobile/Damman	Mobile/Jeddah
Exhibit number of invoice	E1	E2	E3	E4	E5
Invoice date	Dec. 4, 1974	Dec. 13, 1974	Feb. 7, 1975	Feb. 7, 1975	Mar. 12, 1975
Number of vehicles billed for offloading services	18	30	78	91	84
Correct charge:					
Actual (manifested) tonnage of cargo offloaded	677.83 MT (18 veh.)	1129.71 MT (30 veh.)	2964.23 MT (78 veh.)	2702.70 MT (91 veh.)	2494.80 MT (84 veh.)
Times contractual rate per MT	\$9.15	\$9.15	\$10.25	\$10.25	\$10.25
Equals	\$6,202.13	\$10,336.88	\$30,383.36	\$27,702.68	\$25,571.70
Plus Suez Canal surcharge	<u>1,550.53</u>	<u>2,584.22</u>	<u>7,865.84</u>	<u>6,925.67</u>	<u>6,392.93</u>
Amounts to:	\$7,752.66	\$12,921.10	\$38,249.20	\$34,628.35	\$31,964.63
Waterman's invoice:					
75% of capacity of barges used	900.00 MT (3 barges)	1500.00 MT (5 barges)	3900.00 MT (13 barges)	3900.00 MT (13 barges)	3600.00 MT (12 barges)
Times contractual rate per MT	\$9.15	\$9.15	\$10.25	\$10.25	\$10.25
Equals	\$8,235.00	\$13,725.00	\$39,975.00	\$39,975.00	\$36,900.00
Plus Suez Canal surcharge	<u>2,058.75</u>	<u>3,431.25</u>	<u>9,993.75</u>	<u>9,993.75</u>	<u>9,225.00</u>
Amounts to:	\$10,293.75	\$17,156.25	\$49,968.75	\$49,968.75	\$46,125.00
Amount overbilled (or claimed by Waterman)	\$2,541.09	\$4,235.15	\$11,719.55	\$15,340.40	\$14,160.37

Note: MT = measurement ton (40 cubic feet)

OFFLOADING CHARGES

Voyage	Fifth	Sixth	Seventh		
Ship	HOUSTON	LEE	JACKSON		
Shipping order number	315-23	318-24	366-28		
Loading port/Discharge port	Mobile/Jeddah	Mobile/Jeddah	Mobile/Kuwait	Mobile/Jeddah	N.O./Jeddah
Exhibit number of invoice	E6	E7	E8	E9	E10
Invoice date	Apr. 22, 1975	May 23, 1975	Jun. 23, 1975	Jun. 23, 1975	Jun. 23, 1975
Number of vehicles billed for offloading services	154	182	49	70	6
Correct charge:					
Actual (manifested) tonnage of cargo offloaded	4573.80 MT (154 veh.)	5601.40 MT (182 veh.)	1798.35 MT (49 veh.)	2513.00 MT (70 veh.)	179.10 MT (6 veh.)
Times contractual rate per MT	\$10.25	\$10.25	\$10.25	\$10.25	\$10.25
Equals	\$46,881.45	\$57,414.35	\$18,433.09	\$25,758.25	\$1,835.78
Plus Suez Canal surcharge	<u>11,720.36</u>	<u>14,353.59</u>	<u>4,608.27</u>	<u>6,439.56</u>	<u>458.95</u>
Amounts to:	\$58,601.81	\$71,767.94	\$23,041.36	\$32,197.81	\$2,294.73
Waterman's invoice:					
75% of capacity of barges used	6600.00 MT (22 barges)	7800.00 MT (26 barges)	2100.00 MT (7 barges)	3000.00 MT (10 barges)	300.00 MT (1 barge)
Times contractual rate per MT	\$10.25	\$10.25	\$10.25	\$10.25	\$10.25
Equals	\$67,650.00	\$79,950.00	\$21,525.00	\$30,750.00	\$3,075.00
Plus Suez Canal surcharge	<u>16,912.50</u>	<u>19,987.50</u>	<u>5,381.25</u>	<u>7,687.50</u>	<u>768.75</u>
Amounts to:	\$84,562.50	\$99,937.50	\$26,906.25	\$38,437.50	\$3,843.75
Amount overbilled (or claimed by Waterman)	\$25,960.69	\$28,169.56	\$3,864.89	\$6,239.69	\$1,549.02

Note: MT = measurement ton (40 cubic feet)